
U.S. Department of Labor
Office of Administrative Law Judges
304A U.S. Post Office and Courthouse
Cincinnati, Ohio 45202

(513) 694-3252

Date Issued: May 11, 1983
Case No. 83-ERA-00005

In the Matter of

MELBERT J. LANDERS
Complainant

v.

COMMONWEALTH LORD JOINT VENTURE
Respondent

Appearances:[1]

Thomas A. Dattilo, Esq.
For the Complainant

Paul M. Schudel, Esq.
C. Dant Kearns, Esq.
For the Respondent

Before: Daniel J. Roketenetz
Administrative Law Judge

DECISION AND ORDER
Statement of the Case

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This proceeding arises under the Energy Reorganization

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Act of 1974, as amended (42 U.S.C. § 8511 *et seq*.), hereinafter called the Act. This legislation prohibits a Nuclear Regulatory Commission (NRC) licensee from discharging or otherwise discriminating against an employee who has engaged in activity protected under the Act. The Act is implemented by regulations designed to protect so-called "whistleblower: employees from retaliatory or discriminatory actions by their employers. (29 CFR Part 24) An employee who believes that he or she has been discriminated against in violation of the Act may file a complaint within 30 days after the occurrence of the alleged violation.

On February 19, 1983, Melbert J. Landers, the Complainant in this case, filed a timely complaint of alleged discrimination. (Admin. Ex. 1)[2] In his the complainant, the Complainant alleges that his employment with the Respondent was terminated on January 20 because he engaged in activities protected by the Act. Pursuant to the implementing regulations, the complaint was referred to the United States Department of Labor, Wage and Hour Division, which, following investigation of the complainant's allegation, found that the Complainant was terminated because he was about to commence or or cause to be commenced a proceeding under the Act. (Admin. Ex. 2) In its Letter of Findings, the Wage and Hour Division ordered the Respondent to reinstate the Complainant to his former position, together with compensation and all backpay, terms and conditions and privileges of his employment, and for compensatory damages, reasonable attorney's fees, punitive damages, costs and all other and proper relief. Thereafter, the Respondent filed a timely request "or a hearing before the Office of Administrative Law Judges. (Admin. Ex. 3)

In its Answer to the Amended Complaint (Admin. Ex. 7), the Respondent admits jurisdiction of the Department of Labor over this matter, but denies all other allegations of the Complaint. Additionally, the Respondent raises several affirmative defenses, alleging that the Complaint fails to state a claim upon which relief may be granted; that the Complaint was not timely filed; that the prohibiting of the Act (42 U.S.C. § 651 (a)) are inapplicable because the Complainant

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deliberately violated § 206 of the Energy Reorganization Act by failing to report allegedly defective joint welds; and that the complainant was not an employee within the meaning of the Act and, therefore, not subject to its protection.

Pursuant to Notice, a *de novo* hearing was held before the undersigned on April 19 and 19 at Madison, Indiana. The parties were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Post-hearing briefs were not permitted, but both parties made closing argument at the hearing. In addition, counsel for both parties filed pre-hearing memoranda with the undersigned.

Based upon the entire record, including my observation of the witnesses and their demeanor, the testimony and evidence presented at the hearing and the arguments of the parties, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Timeliness of Complaint:

The record discloses, and I find, that the Complaint was filed within the time limits set forth in the Act and the implementing regulations. (29 CFR § 24.3)

Jurisdiction:

The Respondent concedes, and I find, that the Office of Administrative Law Judges, United States Department of Labor, has jurisdiction to decide the issues at hand as raised pursuant to the Act. However, it is clear that this office does not have jurisdiction to decide any issues relative to the quality of the construction work in question. Those questions are within the province of other federal regulatory agencies. Therefore, any references to quality in this Decision and Order are not to be construed in any manner as findings in that regard.

The Respondent does not contest, and I find, that Commonwealth Lord Joint Venture, the Respondent's is an employer within the meaning of the Act.

Issues Presented:

It appears, after an examination of the Complaint, Amended Complaint and the Respondent's Answer to the Amended Complaint, that the primary issues to be resolved in this case are:

1. Whether the Complainant is an employee of the Respondent, entitled to the protection of § 851 (a) of the Act;

2. Whether the Complainant's employment was discriminatorily terminated by the Respondent because he engaged in activities protected by the Act; and,

3. Whether the Complainant is entitled to any remedial relief.

Background:

The Respondent is an electrical contractor engaged in performing certain electrical construction work at the Marble Hill nuclear power facility near Madison, Indiana. Such work is being performed pursuant to contract with the Public Service Company of

Indiana (PSI), the owner of the Marble Hill facility. The construction work performed by the Respondent must comply with a rigorous quality assurance program in order to conform to NRC guidelines for the construction of nuclear facilities. In fulfilling its obligations to assure quality, the evidence reflects that Respondent has used a composite of quality assurance personnel either in its own employ or those obtained from engineering and consulting firms on a contract basis. The Complainant, Mr. Landers, was among personnel in the latter group, known as contract employees or job shoppers.

Pursuant to respondent's purchase order of October 13, 1982, (Resp. Ex. 2) the Complainant was referred to the Respondent by the Belcan Corporation, a Cincinnati-based company which provides engineering services. Pursuant to that purchase order five individuals were referred to the Marble Hill project by Belcan on or about December 6, 1982. (Resp. Ex. 10) The first two weeks of the Complainant's tenure at Marble Hill were taken up with the Respondent's training program. Thereafter, complainant was certified in late December 1982 as a Level II welding inspector. Complainant performed his duties in this capacity until January 20, when he was advised by Respondent's personnel manager, Noel Rogers, that his services were no

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longer needed. He was advised that his termination was due to disruptive conduct by causing morale problems and because of his attitude. That Landers was qualified as a Level II Welding Inspector is not at issue.

Complainant's Status as an Employee:

The threshold issue to be decided in this case in whether the Complainant was an employee within the purview of § 5851 (a) of the Act. The Respondent asserts that Complainant was not its employee and, therefore, that he is not entitled to the protection which that section affords. That section provides as follows:

> Discrimination against employee.
> (a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in such a proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in any such a proceeding or in any other manner in such a proceeding or in any other

action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

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The Act does not define an "employee" as contemplated by this legislation. However, the courts have on numerous occasions considered this question in the context of other regulatory schemes. Most analogous to this consideration are cases which have arisen under the National Labor Relations Act (NLRA). Recently, one court held that "[ilf a choice must be made among guiding standards for allocating the burden of proof under the anti-discrimination provisions of the Energy Reorganization Act, it would appear obvious that a court should look to cases construing the National Labor Relations Act . . ." *DeFord v. Secretary of Labor, et al.*,___ F.2d___ Nos. 81-3228, 61-3254, 81-3401 (6th Cir., February 10, 1983), slip op., p. 7.

In *N.L.R.B. v. Hearst Publications Inc.*, 322 U.S. 111 (1944), the Supreme Court said that, in determining whether particular individuals are employees, it is relevant that they are subject, was a matter of economic fact to the evils the statute was designed to eradicate and that the remedy it affords are appropriate for preventing them or curing their harmful effects in the special situation". *Id*. at p. 127. Later, the Court held in *U. S. v. Silk*, 331 U.S. 704 (1974) that in relation to the Social Security Act, the terms "employment" and "employee" are to be construed to accomplish the purposes of the legislation. *Id*. at p. 712.

In accordance with the mandates of the Supreme Court, I find that the term "employee" as used in this Act must be given a more liberal interpretation, particularly in view of the evils the Act was designed to prevent. It is obvious that the Act is intended to prevent employers from engaging in acts of discrimination, whether it takes the form of termination of employment or simple intimidation. In light of these statutory objectives, the overriding public policy considerations involved would compel that the term employee be as inclusive as is rationally possible. To adapt the Respondent's contention that a contract employee cannot be considered as its employee under any circumstances would be far too narrow a construction to give the Act any real meaning. Such a finding would facilitate an employer, who might otherwise be subject to the proscriptions of the Act, in circumventing the statute

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by simply using contract employees rather than employees in their direct employ. On the other hand, the statute is not to be so broadly construed as to include every person who might have some working relationship with an employer, no matter how superficial or remote. The courts have long recognized the need for considered inquiry in determining whether an employer- employee relationship exists, given the purposes of the statute under which a violation is alleged.

The Fourth Circuit in *N.L.R.B. v. Tri-State Transport Corp.*, 649 F.2d 993 (1981), said that:

> In distinguishing employees from independent contractors,
> there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common law agency principles. (quoting *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, at 258)
> Those common law principles may be referred to as the right-to-control test. *Id*. at 995.

The First Circuit has held that an employer within the meaning of the NLRA need not be in a technical employer- employee relationship with any particular employer in order to receive protection from threats of coercion. *N.L.R.B. v. Union National De Trabajadores, et al.*, 611 F.2d 926 (1979). Applying the right-to-control test, the Sixth Circuit has found that newspaper carriers were employees in view of the substantial control by district managers over the carriers, notwithstanding that they were not on the publisher's payroll, that the publisher did not withhold Social Security or income taxes and did not provide workers' compensation. *Newspaper Drivers and Handlers Local Union v. N.L.R.B.*, 612 F.2d 116 (1982). The Eighth Circuit in *St. Charles Journal, Inc.,*

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v. N.L.R.B., 679 F.2d 759 (1982), also applied the right-to- control test, relying on the Supreme Court's decision in *United Insurance Co., supra*.

Finally, it is noted that in cases involving a determination of employee status vis-a-via the enforcement of anti-discrimination type statutes, employers have been found to be joint employers under certain circumstances. Thus, in *General Electric Corporation*, 256 NLRB 753 (1981) General Electric company was held to be a joint employer with the J. P. Shirley Company, which furnished labor to General Electric for the construction of hydroelectric power plants. The National Labor Relations Board relied an evidence that Shirley did not provide on-site supervision of persons furnished to General Electric and, further, with regard to personnel matters, *e.g.*, layoffs of individuals, such decisions were made by General Electric, which then notified Shirley of its decision.

With these principles in mind, I now turn to the facts of this case. A composite of the credited testimony reflects that Belcan is a job shop which serves as a repository of resumes of persons purportedly qualified to perform certain engineering services. Pursuant to the October 1982 purchase order from the Respondent, Belcan provided the Respondent with several resumes, including that of Complainant Landers, for contract labor. From among the resumes submitted to the Respondent by Belcan, Complainant and others were chosen by the Respondent to fill its needs. Thus, the Respondent was involved in one of the most elemental facets of the employer- employee relationship - the

selection process. Once selected by the Respondent, the contract employees were then notified by Belcan, which, according to the credited testimony of Babb d'Oraczio, acted as agents for these persons, setting forth the initial reporting time and rate of compensation. When a contract employee reported to work for the Respondent, the individual was required to abide by the working rules established by PSI, which were applicable to all employees, regardless of his status. (Resp. Ex. 12) Contract employees were also required to complete an extensive in-house training program designed to assure compliance with the quality assurance program established by the Respondent. Respondent furnished contract employees with all tools and established their regular and overtime hours of work. Moreover, the record

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reflects that contract employees, like direct employees, were subject to the same supervision, worked side by side with direct employees and were considered by direct employees to be their co-workers. Finally, the evidence further discloses that promotions of contract employees from rank-and-file positions to supervisory positions were effected by the Respondent with no apparent consultation with Belcan.

Based on the foregoing and the entire record, I find that the Complainant, Melbert Landers, was an employee of the Respondent within the purview of the Act. In making this finding, I rely particularly upon the Respondent's involvement in the selection process of Landers, the everyday control exercised over Landers' activities, the common supervision of all employees and that the Respondent unilaterally determined the termination of Landers' employment, notwithstanding evidence that Belcan prepared Landers' paycheck, withheld usual deductions and provided workers' compensation.

Whether the Complainant Engaged in Activities Protected by the Act:

Having determined on the particular facts of this case that the Complainant, for the purposes of the Act, stood in an employee-employer relationship with the Respondent, it must next be determined whether he was engaged in activities protected by the Act and, if so, whether the Respondent terminated his employment because of those activities.

As noted above, Complainant became certified as a Welding Inspector, Level II, following completion of the Respondent's training program in late December 1982. Thereafter, according to Landers' testimony, he became concerned with what he perceived as a problem in the traceability of materials used in the construction of hangers which supported trays, which, in turn, would ultimately carry electrical service to various parts of the facility. While there is some contention by the Complainant that he also complained of defective weld joints prior to his termination, the evidence does not Support those assertions in relation to his termination date of January 20.[3] Moreover, the evidence reflects that Complainant did not meet with any NRC officials until the day after his employment was terminated, at which time he first made allegations concerning defective weld joints. Thus, I find that the only alleged

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defect of which Landers complained prior to his termination related to the traceability of materials used in the construction of the hangers.

Complainant prepared four nonconformance reports prior to his termination. (Compl. Exs. 33, 32, 28, 22, dated January 4, 7, 10 and 14, respectively) A nonconformance report is a document prepared by an inspector when the inspector perceives what he considers to be a defect or shortcoming in the quality of the work performed. Upon completion of the nonconformance report by the inspector, it is reviewed by the leadman, who then forwards it up the line to the supervisor for validation. Validation occurs when the designated supervisor concurs with the assessment of the inspector that the items may indeed be defective or not otherwise in compliance with established quality standards. Landers testified that with regard to the first three nonconformance reports the nonconforming condition was reported to his immediate leadman, Kevin Gatewood, and that on each occasion he and Gatewood made a field trip to the affected areas. According to Landers' testimony, Gatewood agreed that a nonconforming condition existed. Gatewood, however, flatly denied ever having taken any field trips with Landers relative to these nonconformance reports. The evidence reflects that in at least two instances Welding Supervisor Mark Priebe validated Landers' nonconformance reports of January 4 and 10. (Compl. Exs. 24, 23)

Landers additionally testified that on one occasion, on or about January 17, specifically with regard to the last nonconformance report prepared by him prior to his discharge, that William Linthicum, who had replaced Gatewood as a leadman, and Gatewood, who had been promoted to the position of a quality control engineer, tried to get him to retract the January 14 nonconformance report. Gatewood and Linthicum deny that they were trying to get Landers to retract the nonconformance report, Gatewood contending that the report contained too much information, and Linchicum explaining that the report was not specific enough so that a determination could be made as to validation.

The evidence reflects that the two nonconformance reports which were validated by Mark Priebe were not disposed of until several days after Landers was terminated.[4] This evidence tends to support Landers testimony that he was frustrated that

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no action was being taken with regard to the traceability problems which he felt was an immediately reportable condition to the project owner, PSI, or to the NRC. Landers' credited testimony in this regard reflects that he expressed his concerns, not only to a number of supervisory personnel, including Kevin Gatewood, Mark Priebe, William Linthicum and Richard Pendergast, Quality Control Manager, but he also was vocal in his concerns to his contemporaries and to construction employees. Larry Paul, employed as a journeyman-wireman by the Respondent, testified that, on at least one occasion,

Landers said to him that he (Landers) did not see how the NRC could not shut down the project on its next inspection. Paul states that he conveyed this statement to his immediate supervisor, Chester Walker, also employed by the Respondent.

There in no evidence in this record that Landers' complaints about the traceability of materials used in hanger construction were calculated to harass, disparage or harm the Respondent. On the contrary, the fact that at least two of his nonconformance reports were validated supports the conclusion that Landers was acting in good faith. Respondent asserts, however, that Landers' expressions of concern about the problems that he perceived created a morale problem among those employees, which, in turn, justified his termination. Respondent makes no argument that Landers was not qualified or that he was not doing his job properly when he prepared the nonconformance reports in evidence. Rather, the defense seems to be based upon the notion that because Landers engaged in some "bravado", as it is characterized by Personnel Manager Rogers, before other employees about what he had observed on the job, such conduct exempted Landers' activities from the realm of those protected by the Act. However, I find that the fact that Landers may have been vociferous about his beliefs or indiscreet in conveying those concerns and what he intended to do about them to follow employees as irrelevant to this consideration. In my opinion, the very essence of the Act in protecting employees from discrimination and the public policy considerations involved, dictate that employees be afforded a fill and unhindered right to express their opinion, except to the extent that such opinions may be totally false, misleading or malicious. The fact that the expression of such opinions may contribute to a morale problem is unfortunate, but the underlying activity, nevertheless, remains protected. The courts have hold that complaints concerning noncompliance

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with NRC regulations is activity protected under § 5851 (a) of the Act. *Consolidated Edison Company of New York, Inc., v. Donovan*, 673 F.2d 261 (2nd Cir., 1982); *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563 (8th Cir., 1980).

Whether the Complainant was Terminated Because of His Protected Activities:

The Respondent argues, and I agree, that in determining whether the Complainant was terminated because of his protected activities the evidence should be analyzed in light of the NLRB's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), which is based upon the Supreme Court's decision in *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977). The *Wright Line* test in mixed or dual motive discharge cases seems to be gaining universal acceptance among the courts, and it has been hold to be applicable to cases arising under this Act, an well an other federal statutes. *Consolidated Edison Company of New York, Inc., supra*; *DeFord v. Secretary of Labor, et al., supra*. More recently, the Sixth Circuit has held that the *Wright Line* is applicable in assessing whether a discriminatory discharge occurred under the Federal Mine Safety and Health Act of 1977. *Boich, d/b/a W. S. Coal Company, v. Federal Mine*

Safety and Health Review Commission, __ F.2d__ (6th Cir., April 5, 1983). The Seventh Circuit, the jurisdiction in which the events sub judice occurred, has also adopted the *Wright Line* test in considering enforcement of NLRB orders. *N.L.R.B. v. Town and Country L. P. Gas Service Co.*, 687 F.2d 187 (7th Cir., 1982) *Sioux Products, Inc., v. N.L.R.B.,* 684 F.2d 1251 (1982); *Peavey Co. v. N.L.R.B.*, 648 F.2d 460 (1981). While no cases are found where the Seventh Circuit applied the *Wright Line* test to regulatory schemes other than the National Labor Relations Act, I find that it is nevertheless applicable in this case in determining the propriety of Landers' termination.

The *Wright Line* rule, as applied by the Seventh Circuit, is that there must be:

> ". . . a *prima facie* showing that the employee's protected . . . conduct was a motivating factor in his discharge, whereupon the burden shifts to the employer to demonstrate that the employee would

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> have been discharged even in the absence of the protected conduct." *N.L.R.B. v. Town and Country L. P. Gas Service Co., supra*, at 191.

Assessing the legitimacy of the reasons advanced for the discharge in cases of this type is especially difficult since it is seldom that direct evidence of an unlawful motive exists. "The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." *Ellis Fischel State Cancer Hospital v. Marshall, supra*, at 566.

In this case, the Respondent asserts that it had no knowledge of the Complainant's protected activities and, therefore, its termination of his employment could not have been unlawfully motivated. However, the record in this case is replete with evidence demonstrating an awareness of Landers' activity by supervisory personnel of the Respondent, including the two individuals who were responsible for effecting his termination, Noel Rogers and Richard Pendergast. Rogers testified that his information was that Landers had been telling employees that he personally could shut the Job down, Landers apparently not making any reference to the NRC. Rogers was aware, though, and so testified that he knew that the only authorities that could have shut the project down were either PSI, the owner, or the NRC and that Landers had no personal authority to close down the project. Moreover, Rogers was aware that Landers had been expressing concerns about the traceability of materials being used by the Respondent in the construction project. Pendergast was also aware of Landers' complaints and testified that he personally spoke to Landers about the alleged traceability problem a few days before Landers' termination. Thus, to find lack of knowledge by the Respondent would give credence to such naivety on the part of Rogers and Pendergast as, to raise questions about their management abilities. Thus, I find and conclude that Respondent, through any number of supervisory personnel, was fully aware of Landers protected activities, manifested in his complains about traceability of materials.

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I further find that Landers' protected activities were a motivating factor in his termination. In this regard, the circumstances surrounding the termination are most significant. On the eve of Landers' termination, he communicated with Ralph Steven Sallee, employed by PSI as the Quality Control Manager of materials. Landers informed Sallee that he was having difficulty obtaining validation of nonconformance reports and that he believed the Respondent was not maintaining the traceability of materials. According to Sallee's testimony, he then called Howard Curry, also employed by PSI as a Quality Engineer Manager over electrical work. Curry was advised of the information, although it appears that Landers' name was not mentioned to Curry. Curry, who was called as a witness for the Respondent, testified that he then instructed Kenneth Rafferty, a Surveillance Supervisor employed by PSI, to inquire into the alleged traceability problem.

Rafferty testified that on January 19 he visited the jobsite and reviewed approximately 40 documents at the Respondent's office pertaining to traceability and, while he was there, he spoke to both Larry Dick and Richard Pendergast about the alleged traceability problems. Pendergast testified that he did not recall any such conversation with Rafferty. However, I do not credit his denial. I find it incredulous that Pendergast, an obviously astute manager, did not make the connection between the purpose of Rafferty's visit and the fact that Landers' had made several complaints about traceability of material, including to Pendergast himself. It was the very next morning, at the commencement of his workshift, that Landers was terminated.

Other factors surrounding the termination, which I find compelling, are the precipitousness of the termination, without any warning or counseling to Landers about his alleged disruptive conduct, and that there was no investigation into the claims that Landers' conduct was causing morale problems among employees. In the latter respect, Respondent's witnesses, James Burgin and Larry Paul, employees supposedly impacted by this morale problem, were very little help in terms of their testimony in supporting the Respondent's contentions.

Accordingly, I conclude that the Complainant has established a *prima facie* case that his employment was terminated because he engaged in activities protected by the Act. The burden then shifts to the Respondent to demonstrate that Landers would have been discharged even in the absence of

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the protected conduct. Based on the foregoing, and the record as a whole, it is clear that the Respondent has not carried its burden to show that Landers would have been terminated on January 20, notwithstanding his protected activities. That he was terminated because of disruptive action manifested by morals and attitude problems, as

testified to by Noel Rogers, must fail as a pretext for the true reason for his termination, *i.e.*, his complaints about the quality of the work being performed by the Respondent at the Marble Hill facility. A discharge effected due to reasons which were a consequence of the Complainant's protected activities does not legitimize the discharge so as to rebut the *prima facie* case established.

Respondent further argues that, in any event, the Complainant would have been terminated as a contract employee because of its policy of replacing contract employees with direct employees as expressed in its December 16, 1982, memo. While there is no contention that this management decision was unlawfully motivated or that it was not based on sound economic reasons, it is clear that Landers' termination would not have occurred on January 20 but for the Complainant's protected activities, notwithstanding the Respondent's decision to eventually replace contract employees. Indeed, Richard Pendergast testified that perhaps Landers would have continued to work for another week had he not been discharged for the reasons advanced by the Respondent. Noel Rogers also admitted that Landers would have probably worked a few more days. That being the case, I find that a discussion of just how long Landers would have continued to work on the job but for the unlawful discrimination against him, is more pertinent to fashioning a remedy rather than in the context of the Respondent's motivation.

Proposed Remedy:

Having found that Complainant was unlawfully terminated on January 20 and that the Respondent has not satisfactorily borne its burden to rebut this finding, a suitable remedy must be devised. The Act provides at § 5851 (b) (2) (B) that if it is determined that a violation of the Act has occurred, the person who committed the violation shall be ordered:

> (i) to take affirmative action to abate the violation, and

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> (ii) reinstate the complainant to his former position together with the compensation (including backpay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order in issued under this paragraph, the Secretary, at the request of the Complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the secretary, by the Complainant for or in connection with, the bringing of the complaint upon which the order was issued.

See also 29 CFR § 24.6 (b) (2).

As earlier noted, Complainant was a contract employee and, therefore, absent any unlawful reasons, his employment with the Respondent was terminable at will. I have found, however, that because of reasons proscribed by the Act, Complainant's employment was terminated prematurely. Upon such a finding, the Act requires that the

person who committed the violation be ordered to take the action set forth in the statute, including reinstatement of the complainant to his former position of employment and that he he made whole for any loss of backpay. Because the statute prescribes the remedy in the finding of a violation, the burden to demonstrate mitigation of any backpay award and compensatory damages lies with the Respondent.

The Respondent contends that had Landers not been terminated on January 20, he would have been terminated at some date shortly thereafter. Richard Pendergest testified, as earlier noted, that Landers would have been terminated in another week, in any event, because another person had been hired directly by the Respondent to replace Landers. Noel Rogers similarly testified that Landers may have continued as a contract employee only for a few more days had he not been terminated for morale and attitude problems on January 20. Respondent also introduced into evidence a document entitled "Contract Employee List". (Resp. Ex. 10) The list purports

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to show the names of contract employees from about July 1982 until at least the time of the hearing. The list confirms the Respondent's economically motivated decision to replace contract employees with direct hires. However, the assertions by Rogers and Pendergast relative to the brevity of Landers' tenure are belied by Respondent's Exhibit 10, which indicates that contract employees, as a group, worked for substantially longer periods of time than the Respondent would have me believe. More particularly, of the contract employees referred by Belcan on December 6, 1982, the compilation reflects that Landers and Nathan McClesky were terminated on January 20.[5] The compilation also shows that Tom Hicks apparently left of his own accord on January 6 and, therefore, his release date is not considered reflective of the average length of contract employees. The remaining two contract employees referred by Belcan are Charles Brumley and Johnny Bryant. Both employed as welding inspectors, the compilation discloses that Bryant was offered and apparently accepted direct employment by the Respondent on March 1, 1983, and that Brumley was still employed as a contract employee an of the date of the hearing, but according to the testimony, was scheduled for release on May 1983. There is no evidence as to whether Brumley would have been offered direct employment with the Respondent. However, according to the testimony of Noel Rogers and Richard Pendergast, Respondent had determined a policy in conjunction with its desire to use direct hires rather than contract employees, that those contract employees that were considered qualified would be offered direct employment with the Respondent prior to their release. That this policy existed is buttressed by the testimony of Charles Jay, who preceded Rogers as the personnel manager, as well as the testimony of Landers and Nathan McClesky. Moreover, implementation of this policy is reflected on Respondent's Exhibit 10, which reveals that several contract employees were offered direct employment with the Respondent, which was apparently accepted.

Of particular significance is what is not shown on Respondent's Exhibit 10. Thus, it does not show when Landers would have been released as a contract employee had he not

been unlawfully terminated, moreover, there is no showing on this record that if Landers not been terminated on January 20 for the reasons suggested by the Respondent that he would not have

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been offered employment directly with the Respondent and if offered, that he would not have accepted such employment. Considered in light of the Respondent's policy of offering contract employees an opportunity to be employed directly by it, coupled with its admission that Landers was qualified as a Welding Inspector, Level II, I find that the Respondent has not presented sufficient evidence which would toll its backpay liability or obviate the statutory requirement that Landers be offered reinstatement.

Conclusion:

Based on the foregoing, and the record as a whole, I find and conclude that the Respondent is an employer within the meaning of the Act; that Melbert Landers was an employee of the Respondent for the purposes of the Acts that Landers was terminated because of his activities protected by the Act; and that he is entitled to appropriate remedial relief. Accordingly,

IT IS HEREBY ORDERED:

1. That Respondent, in order to abate the violation found herein and to dissipate the adverse effects that Respondent's unlawful conduct may have had on its employees, post a copy of this Decision and Order in conspicuous places where its employees may congregate for a period of not less than 30 working days; and, upon request, to provide a copy of this Decision and Order to any of its employees;

2. To offer the Complainant, Melbert J. Landers, immediate and unconditional reinstatement to his former position of employment, together with backpay (to be computed as hereinafter set forth), with the terms, conditions and privileges of his employment enjoyed by employees in the direct employment of the Respondent. Backpay is to be computed from January 24, 1983,[6] until the date that the Complainant either accepts or rejects the Respondent's unconditional offer of reinstatement. Complainant is to be compensated at his contract hourly rate of $22 per hour regular time and $33 per hour overtime from January 24 until May 6, 1983, the date on which the last non-supervisory contract employees was released from his contract, based on a 40 hour work week with overtime hours, if any, to be

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computed based on the average number of overtime hours worked by other welding inspectors, irrespective of their employment statue. Thereafter, Complainant is to be

compensated at the same rate based on a 40 hour work week as are other Level II welding inspectors in the direct employ of Respondent with overtime hours to be computed as got forth above. Complainant will be responsible for payment of all usual and normal withholding taxes for compensation received until May 6, 1983. Thereafter, Respondent will be responsible for all usual and normal deductions from Complainant's compensation in the same manner as its other employees.

Backpay is to be offset by any and all interim earnings Complainant may have had between the time of his unlawful termination and the date he either accepts or rejects Respondent's offer of reinstatement. Further, complainant is not entitled to any per diem or living expenses which he would have otherwise received from the Respondent had he continued in the employ of the Respondent since such expenses were not incurred by the Complainant following his termination.

Within 20 days from, the date this Order becomes final, Complainant is to submit to the undersigned a statement of all interim earnings, and Respondent to to submit a statement as to the amount of backpay due as computed in accordance with this Order. Thereafter, the parties shall have 10 days to file any comments or objections to the respective submissions;

3. That Respondent also pay to the Complainant interest on the net backpay due at the rate of 8.9 percent per annum, which is the equivalent coupon yield (as determined by the Secretary of the Treasury) of the average accepted auction price at the last auction of the 52 week United States Treasury bills, as required by the provisions of § 302 of the Federal Courts Improvement Act of 1982 for the determination of interest rates payable on civil judgments in the United States district courts;

4. That the Respondent compensate the Complainant for all costs and expenses reasonably incurred by him for, or in connection with, the bringing of the complaint upon which this Order was issued. Such costs and expenses shall include attorney's fees, litigation expenses, witness fees, and expenses

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incurred by the Complainant in connection with seeking interim employment.

With respect to attorney's fees, Complainant's attorney is directed to prepare an itemized billing of the time expended by him in connection with the prosecution of this claim based on his normal hourly rate for such services. Counsel is not entitled to fees for services rendered to the Complainant which are not directly related to the instant litigation. Counsel is to submit his itemized bill to the undersigned 20 days from the date that this Order becomes final and, thereafter, the Respondent shall have 10 days to file any objections to the fee claimed by Complainant's counsel.

Likewise, the Complainant is to submit an itemized statement of expenses incurred by him in connection with the bringing of this complaint, including fees for witnesses, and any reasonable expenses incurred by the Complainant in seeking interim employment. Complainant's itemized expenses are to be supported by adequate documentation, such as bills or receipts or cancelled checks, where possible. Where no such documentation is available, the expense shall be supported by a sworn affidavit of the Complainant that the expense was incurred in connection with this claim. Such claim for expenses must be filed with the undersigned within 20 days from the date this order becomes final. Respondent shall have 10 days thereafter to file any objections to any expenses claimed;

5. Upon receipt of all submissions, objections and/or comments, as set forth above, a separate Order will be issued specifying the liability assessed against the Respondent;

6. As there in no provision in the Act or regulations, the Complainant's request for punitive damages is hereby denied;

7. The Respondent's Motion to Dismiss, made at the hearing, is hereby overruled;

8. The Respondent's affirmative defense that Complainant deliberately violated § 206 of the Act is found to be without merit, and it is hereby dismissed; and,

9. This Decision and Order becomes final 90 days following the date of the filing of the Complaint in this case, unless modified or vacated by the Secretary of Labor. (29 CFR

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§ 24.6) Thereafter, any person adversely affected or aggrieved by the final Order may obtain review thereof in the United States District Court of Appeals for the circuit in which the violation, with respect to which the Order issued, allegedly occurred. (42 U.S.C. § 5851 (c); 29 CFR § 24.7) DANIEL J. ROKETENETZ Administrative Law Judge

[ENDNOTES]

[1] Special appearances were made at the hearing by James R. Pope, Seq., and Ronald J. Brothers, Esq., on behalf of Public Service Company of Indiana, Inc., the owner of the Marble Hill nuclear power facility; Stephen H. Lewis, Regional Counsel of the United States Nuclear Regulatory Commission, representing witness John J. Harrison; and Curtis M. Jacobs; Esq., representing witness Keith Ewing. None of the attorneys who made special appearances actively participated in the litigation of this case.

[2] In this Decision and Order, "Admin. Ex." refers to Administrative exhibits; "Compl. Ex.' refers to Complainant's exhibits; and "Resp. Ex." refers to Respondent's exhibits. Unless otherwise noted, all dates will be for the calendar year 1983.

[3] Apparently, due to allegations concerning defective weld joints made by Landers to the NRC following the date of his termination, certain construction work was voluntarily suspended at the Marble Hill facility by PSI in late January.

[4] The disposition date of Landers' January 4 nonconformance report was January 28 (Resp. Ex. 24), and that of his January 10 nonconformance report was January 30 (Resp. Ex. 23).

[5] McClesky testified, and the evidence in this case shows, that he was terminated ostensibly for the same reasons advanced to justify termination of Landers. Therefore, I do not consider his termination date as reflecting on the average length of time other contract employees have worked. However, no finding is otherwise made with respect to the legality of McClesky's termination, and it is specifically noted that McClesky did not file a complaint against the Respondent, and any such complaint would now be time barred by the Act.

[6]The evidence reflects that Complainant was paid for the day following his termination.